(3)

No. 01-527

Court, U.S.
NOV 2001

IN THE

Supreme Court of the United States

ROBERT A. ERKINS & BERNADINE ERKINS,

Petitioners,

v.

ALFRED J. BIANCO, As Plan Administrator
to the Estate of Gaston & Snow,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JAMES A. MOSS
Counsel of Record
MARIANNE YEN
HERRICK, FEINSTEIN LLP
Attorneys for Petitioners
Two Park Avenue
New York, New York 10016
(212) 592-1400

170439

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

10pp

TABLE OF CONTENTS

		Page
Table of Cited Authorities	.....	ii
I.	A Sharp Conflict Has Arisen Among The Circuits.	1
II.	Petitioners Have Not Consented To The Application Of New York Law.	14
III.	The Decision Below Undermined Important Federal Interests.	5
Conclusion	.....	7

TABLE OF CITED AUTHORITIES

Page

Cases:

A.I. Trade Finance, Inc. v. Petra International Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) .. 2

Atherton v. FDIC, 519 U.S. 213 (1997) 2

Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291 (1st Cir. 1988) 2

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 4

In re Crist, 632 F.2d 1226 (5th Cir. 1980) 3

In re Lindsay, 59 F.3d 942 (9th Cir. 1995) 2, 3

In re Merritt Dredging Co., 839 F.2d 203 (4th Cir. 1988) 1, 2

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 1, 2, 3, 4, 7

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) .. 2

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 2, 6

I. A SHARP CONFLICT HAS ARISEN AMONG THE CIRCUITS.

Following the reasoning of the Court of Appeals for the Fourth Circuit in *In re Merritt Dredging Co.*, 839 F.2d 203, 205-06 (4th Cir. 1988), the trial and appellate courts below chose to apply the choice of law rule of New York, the forum state, to determine the applicable statute of limitation governing respondent's state-law contract claim. In doing so, the appellate court expressly recognized that it was deviating from the approach that has been adopted by a number of other circuit courts. "The federal courts are divided concerning whether federal choice of law or the choice of law rules of the forum state apply." (App 11a).

Notwithstanding the appellate court's clear statement, respondent principally argues that this petition should be denied because there is no conflict among the circuits at all. According to respondent, supposedly after analyzing the decisions of the various courts more carefully than did the appellate court, all circuit courts have adopted the federal interest analysis test employed by the appellate court in this case. This argument reflects a serious misreading of the decisions of the various circuits that have considered this important issue.

A simple reading of the texts of the decisions in the various circuits puts the conflict in stark relief. Contrary to what respondent suggests, there is no uniform legal standard applied by all circuits in deciding this issue. The differences of opinion among the circuits lie precisely in whether the holding of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), should be extended to non-diversity cases.

To discern this conflict, this Court need only compare the holding in *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) ("When jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law")[1] with the holding in *A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("In view of the reasoning in *Erie*, and its explicit extension to choice-of-law rules in *Klaxon*, it would make little sense for us to conclude that the peculiar brand of federal jurisdiction provided for certain Edge Act transactions calls for a different rule").

The difference of opinion over the applicability of *Klaxon* is also the source of conflict in the bankruptcy cases. Compare the test employed by the Fourth Circuit in *In re Merritt Dredging Co.*, 839 F.2d at 206 ("in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest") with the rule adopted by the Ninth Circuit in *In re Lindsay*,

---

1. It matters not that *Edelmann* was decided by the First Circuit prior to this Court's decisions in *Atherton v. FDIC*, 519 U.S. 213 (1997), and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), for those cases stand for the proposition that compelling federal interests must exist to justify "creation of a special federal rule," which, in those cases, were *substantive* rules of decision concerning the liability of corporate officers. The rule at issue in *Edelmann* and in this case is a *procedural* rule (*i.e.*, the choice of law rule for selecting a statute of limitations) and not a substantive rule of decision. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988). Thus, neither *Atherton* nor *O'Melveny & Myers* requires that a federal-interest analysis be conducted before a federal trial court may consult its own procedural law to choose an appropriate statute of limitations.

59 F.3d 942, 948 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules").[2] Likewise, in *In re Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980), the Fifth Circuit held: "When disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy." Neither the Ninth Circuit nor the Fifth Circuit panels in these bankruptcy cases conducted any federal interest analysis whatsoever. Rather, each simply determined that the rationale of *Klaxon* did not apply outside of the diversity context.

Clearly, as the Second Circuit panel in this case recognized, its decision to apply the forum state's conflicts law (after performing a federal-interest analysis) sharply conflicts with the decisions of the First, Fifth and Ninth Circuits to apply the federal choice of law rule.

---

2. Respondent misstates the facts when it represents that the Ninth Circuit, in *In re Lindsay*, applied federal choice of law rules "after finding a federal interest in uniformity of application of a substantive provision of the bankruptcy laws." (Op. Br. at 8). No substantive bankruptcy provision was at issue in that case. Rather, the substantive provision at issue was a question of state law pure and simple — whether a foreclosure on property complied with either the law of Texas or California. In fact, the Ninth Circuit commented that "inadequacy of price is a ground for setting aside the foreclosure . . . if state law so provides, but it is not a federal standard independent of state law enabling a bankruptcy court to set aside a foreclosure sale." 59 F.3d at 948.

II. PETITIONERS HAVE NOT CONSENTED TO THE APPLICATION OF NEW YORK LAW.

Respondent argues that this case is "a poor vehicle for the reexamination of the principles of *Erie* and *Klaxon*," because the petitioners consented to the jurisdiction of the New York bankruptcy court and because a reversal of the decision in this case "would not dispose of this case." (Op. Br. at 16-17). Respondent's argument is mistaken in a number of respects. First of all, this petition does not call for the "reexamination" of the *Erie* and *Klaxon* decisions. Rather, this petition presents the question whether the rule of the *Erie* and *Klaxon* cases should be *extended* to apply in non-diversity cases, a question recurring with frequency, and invites this Court to enunciate a rule that will govern in all federal circuits. This case is a perfect vehicle for this Court to establish such a uniform rule.

Moreover, the petitioners have never consented to having the state law of New York applied to them in this action, as respondent seems to be implying. The jurisdiction of the New York bankruptcy court was imposed upon the petitioners pursuant to the nationwide jurisdiction conferred upon that court by statute. When their application for a change of venue to Idaho was denied by the bankruptcy court, the petitioners had no alternative but to defend themselves in the New York federal courts. Nothing in this procedural history equates to the petitioners having "consented" to the application of New York's law.[3]

---

3. Contrary to respondent's suggestion (Op. Br. at 14 n.3), the petitioners have never conceded that this action could have been

(Cont'd)

Finally, a reversal of the decision below will allow the trial court upon remand to select an appropriate statute of limitations, without infringing the important federal interests implicated here (namely, those arising under the Due Process and Privileges and Immunities Clauses). That the case will not end if this appeal is resolved in petitioners' favor is, of course, no reason for this Court to decline to resolve the important question presented.

III. THE DECISION BELOW UNDERMINED IMPORTANT FEDERAL INTERESTS.

Pursuant to the test it adopted in its decision below, the appellate court conducted a federal interest analysis, and concluded that the dual interests of avoiding forum shopping and achieving uniformity of decision do not "implicate significant enough federal interests to justify the creation of federal common law in this case." (App. 13a-14a). That analysis neglected to give a proper consideration to several serious constitutional issues implicated by the adoption of the New York borrowing statute.

In his opposition brief, respondent similarly fails to give proper consideration to those important constitutional issues: namely, the due process implication of applying New York law in the absence of personal jurisdiction by that state, and the implication of adopting a state rule that gives resident plaintiffs an advantage that is denied to non-residents.

(Cont'd)
brought in a Massachusetts state court, or that if it were entertained by a Massachusetts court, the six-year Massachusetts statute of limitations would have been applied in preference over Idaho's four-year statute. Indeed, the petitioners have maintained that they are *not* subject to the jurisdiction of the State of Massachusetts, as the decision below reflects. (App. 19a n.7).

Respondent's effort to address the privileges and immunities issue consists solely of his observing that New York's borrowing statute treats *all defendants* alike (resident and non-resident) and his arguing that the petitioners therefore *lack standing* to argue that they have been victimized by a discriminatory statute. (Op. Br. at 15-16). This argument ignores the obvious: *every* defendant is prejudiced by the application of a discriminatory statute that unfairly gives a special advantage only to a *resident* plaintiff, and may voice an objection. But more to the point, petitioners are entitled to note the strong federal interest embodied in the Privileges and Immunities Clause to avoid such a discriminatory result. That federal interest should have been taken into account, but was not, under the federal-interest analysis invoked by the appellate court below.

Respondent discusses the due process issue in the same perfunctory manner as the appellate court did, arguing that because the trial court possessed personal jurisdiction over the petitioners, it is permitted to apply the law of any state it might choose. (Op. Br. at 16). This argument confuses the right of a court to adjudicate claims against a party that is properly before it with the constitutional obligation of every court not to apply the law of a jurisdiction that lacks minimal contacts with the dispute and the parties. Nothing in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), on which respondent and the appellate court have relied, suggests such a result. In *Sun Oil*, this Court recognized that because the selection of a statute of limitations is a procedural exercise, a forum *court* may apply its own law to make that choice. *Id.* at 722. In the context of this case, that holding allows the forum *court* (here, a *federal* trial court) to apply its own law (namely, *federal* choice of law) to select the appropriate statute of limitations. That, of course, is not what either the trial or appellate courts chose to do here.

This case demonstrates how due process violations can result, not only in this case but in others like it, when the lower courts feel rigidly bound by *Klaxon* to apply the law of the state in which the federal court sits, even where there is no diversity jurisdiction and the forum state had no connection to the controversy. This case thus presents an opportunity for this Court to promulgate a rule that federal choice of law principles should be applied by federal courts in non-diversity cases, just as federal courts routinely apply other federal rules of procedure. Such a uniform rule would have avoided the appellate court's illogical holding that consent to *federal* jurisdiction removed all constitutional barriers to applying *New York* law to a strictly Idaho transaction.

CONCLUSION

This case presents an ideal opportunity for this Court to fashion a rule on an important issue of federal civil procedure as to which the circuits courts are badly divided. Petitioners respectfully request that this Court grant Certiorari to review the issue presented.

Respectfully submitted,

JAMES A. MOSS
Counsel of Record
MARIANNE YEN
HERRICK, FEINSTEIN LLP
Attorneys for Petitioners
Two Park Avenue
New York, New York 10016
(212) 592-1400